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Attorneys for Defendant  
Continental Casualty Company, erroneously sued herein as  
"CNA Insurance Company"

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

**C 05 00391**

IRVING KESLER, an individual,  
  
Plaintiff,

v.

CNA INSURANCE COMPANY (aka  
CONTINENTAL CASUALTY  
COMPANY; TRANSPORT  
INSURANCE COMPANY; CNA  
CASUALTY OF CALIFORNIA;  
NATIONAL FIRE INSURANCE OF  
HARTFORD;  
TRANSCONTINENTAL  
INSURANCE COMPANY;  
AMERICAN CASUALTY  
COMPANY OF READING, PA.;  
VALLEY FORGE INSURANCE  
COMPANY; COLUMBIA  
CASUALTY COMPANY); UNION

No.

**DEFENDANT CONTINENTAL CASUALTY  
COMPANY'S NOTICE OF REMOVAL**

Date:  
Time:  
Before:

CBM-IPG/SF239955.1

NOTICE OF REMOVAL - CASE NO. \_\_\_\_\_

E-filing  
ORIGINAL  
FILED

JAN 26 2005

RICHARD N. V. JAMES  
JAN 26 2005

PACIFIC RAILROAD COMPANY, a  
Delaware Corporation; and DOES 1-  
100, Inclusive,

Defendants.

PLEASE TAKE NOTICE that defendant Continental Casualty Company  
("Continental") gives notice of removal and hereby removes the above-captioned action  
from the Superior Court of the State of California County of Sonoma, pursuant to 28  
U.S.C. § 1441 et seq. In support of this removal, Continental alleges as follows:

### BACKGROUND

1. On December 27, 2004, Plaintiff Irving Kesler filed suit in Sonoma  
County Superior Court against Defendants "CNA Insurance Company (aka Continental  
Casualty Company; CNA Casualty of California; National Fire Insurance Company of  
Hartford; Transcontinental Insurance Company; American Casualty Company of  
Reading, P.A. [sic]; Valley Forge Insurance Company; Columbia Casualty Company)"  
and Union Pacific Railroad Company. This action, *Irving Kesler v. CNA Insurance  
Company et al.*, Case No. SCV 236018 (Cal. Super. Ct., Co. of Sonoma, filed Dec. 27,  
2004), seeks declaratory relief with respect to both defendants and for breach of  
contract, breach of the duty to defend, breach of the implied covenant of good faith and  
fair dealing, and violation of Sections 17200 and 17500 of the California Business and  
Professions Code with respect to "CNA Insurance Company." Complaint ¶ 25, attached  
as Ex. A to the Declaration of Robert Binion ("Binion Decl.").

2. As alleged in the complaint, defendant "CNA Insurance Company"  
purportedly issued various policies of liability insurance covering Plaintiff for his  
expenses incurred in the investigation of third party claims including the underlying  
lawsuit *Union Pacific Railroad Com. v. West Coast Welders Supply Co., Inc. et al.*, Case  
No. C-04-02835 MJJ (U.S.D.C. N.D. Cal., filed July 14, 2004) (the "Underlying

1 Action”), and to defend and indemnify Plaintiff for such claims. Plaintiff alleges,  
2 however, that “CNA Insurance Company” has not satisfied its obligations to provide  
3 such coverage. Complaint ¶¶ 9, 24-26, 30, 38.

#### 4 DIVERSITY OF CITIZENSHIP

5  
6 3. This Court has subject matter jurisdiction over this action pursuant to 28  
7 U.S.C. § 1332. There is complete diversity because all properly joined parties are  
8 diverse and the amount in controversy exceeds \$75,000.

#### 9 Plaintiffs

10  
11 4. Plaintiff Irving Kesler is an individual residing in Sonoma County,  
12 California. Id. ¶ 1.

#### 13 Defendants

14  
15 5. Defendant Union Pacific Railroad Company (“Union Pacific”) is a  
16 Delaware corporation with its principal place of business in Nebraska. Id. ¶ 3; Union  
17 Pacific’s Joinder in Notice of Removal of Action filed concurrently with this Notice of  
18 Removal.

19  
20 6. CNA is a registered service mark and is not a legal entity capable of  
21 receiving service of process or being sued. Defendant Continental is appearing in this  
22 action and is filing concurrently with this Motion a Motion to Dismiss “CNA Insurance  
23 Company,” pursuant to FED. R. CIV. P. 12(b)(4)-(5) and 17(b). For purposes of  
24 diversity jurisdiction, “CNA Insurance Company” has no citizenship and may be  
25 ignored. *Navarro Savings Ass’n v. Lee*, 446 U.S. 458, 461 (1980); *Doe v. Bayer Corp.*,  
26 344 F. Supp. 2d 466, 469 (M.D.N.C., 2004) (unincorporated division of a company  
27 cannot be named as a defendant and should be dismissed. Diversity should be  
28 determined based on the citizenship of the remaining defendant); *Morris v. Princess*

1 *Cruises, Inc.*, 236 F. 3d 1061, 1067 (9<sup>th</sup> Cir. 2001). “If the plaintiff fails to state a cause  
 2 of action against a resident defendant, and the failure is obvious according to the settled  
 3 rules of the state, the joinder of the resident defendant is fraudulent.” *McCabe v.*  
 4 *General Foods Corp.*, 811 F.2d 1336, 1339 (9<sup>th</sup> Cir. 1987). The defendant seeking  
 5 removal is entitled to present facts showing that the joinder is fraudulent. *Good v.*  
 6 *Prudential Ins. Co.*, 5 F. Supp. 2d 804, 807 (N.D. Cal. 1998) (finding fraudulent joinder  
 7 of insurance agent in suit by insured against insurer, where no possibility of recovery  
 8 against agent under California law).

9  
 10 7. Defendant Continental is an Illinois insurance company with its principal  
 11 place of business in Chicago, Illinois. Declaration of David Lehman (“Lehman Decl.”),  
 12 ¶ 3.

13 8. There is complete diversity of citizenship as between the Plaintiffs on the  
 14 one hand, and Defendants Union Pacific and Continental on the other hand.

15 ***CNA is not a Legal Entity Capable of***  
 16 ***Receiving Service of Process or Being Sued***

17 9. There does not now exist nor has there ever existed any legal entity known  
 18 as “CNA Insurance Company” – either as a partnership, corporation, joint venture, or  
 19 other unincorporated association. Lehman Decl. ¶ 11. “CNA” and “Insurance from  
 20 CNA” are both registered service marks. Lehman Decl. ¶ 4,6-7; *see also* Exhibit B to  
 21 Complaint. “CNA Insurance Company” is nothing more than one possible reference to  
 22 the service mark “CNA”. Consequently, Plaintiff cannot sue “CNA.”

23 10. Pursuant to Rule 17(b)<sup>1</sup>, the capacity to be sued is to be determined by the  
 24 law of the state in which the district court is held. FED. R. CIV. P. 17(b). As explained  
 25 above, “CNA Insurance Company” is one possible reference to the “CNA” service mark  
 26 and does not exist (nor has it existed) as a partnership, corporation, joint venture,  
 27

28 <sup>1</sup> All references to “Rule” are to the Federal Rules of Civil Procedure, unless otherwise noted.

1 unincorporated association or any other legal entity. In California, “a nonentity is  
2 incapable of suing or being sued.” *Oliver v. Swiss Club Tell*, 222 Cal. App. 2d 528, 537  
3 (Cal. Ct. App. 1963) (“Where a suit is brought against an entity which is legally  
4 nonexistent, the proceeding is void *ab initio*[.]”).

5           11. Plaintiff’s attempt to serve CNA also failed because CNA is not a legal  
6 entity. *See* Rules 12(b)(4) and (5).

7  
8           12. A district court may disregard a party named in the state court complaint  
9 and retain federal jurisdiction if that party is joined as a sham or if the joinder is  
10 fraudulent.

11           13. This Court should ignore CNA for purposes of assessing diversity because  
12 Plaintiff will not be able to establish service or a cause of action against CNA.  
13 Moreover, Continental has appeared in this action and will respond to the Complaint.  
14

#### 15 AMOUNT IN CONTROVERSY

16           14. The amount in controversy, exclusive of interest and costs, exceeds  
17 \$75,000.

18  
19           15. As alleged in the complaint, the Underlying Action “alleges damages  
20 covered by the CNA insurance policies issued to Plaintiff Kesler.” Defendant Union  
21 Pacific filed the Underlying Action against Plaintiff and others and seeks full  
22 reimbursement from Plaintiff of all its damages. UP Complaint ¶¶ 47, 49-50, 57, 63, 71,  
23 74-75, 77-78 and Prayer 1-9. On November 1, 2004, Union Pacific served its Initial  
24 Disclosures in the Underlying Action. Binion Decl. ¶ 3, Exh. B. In its Disclosure,  
25 Union Pacific stated its damages to date were \$6,028,823.17 and that it expects to incur  
26 in excess of \$3,000,000 more in the future. Plaintiff Union Pacific Railroad Company’s  
27 Initial Disclosures at 6:15-28, attached as Exhibit B to the Binion Decl.  
28

1           16.     Consequently, the amount in controversy here exceeds \$6 million, subject  
2 to the limits of the alleged policies. Plaintiff alleges "CNA Insurance Company"  
3 insured him under policies of liability insurance including those reflected on Exhibit  
4 "A" to the Complaint. Exhibit A purports to be a Certificate of Insurance showing  
5 primary and excess liability limits in excess of \$75,000.

6           17.     Based on these allegations, the amount in controversy threshold has been  
7 satisfied.  
8

9                               **REMOVAL IS PROPER**

10           18.     This Court has subject matter jurisdiction over this matter pursuant to 28  
11 U.S.C. § 1332. For all the reasons shown above, "CNA" was improperly joined in this  
12 action and has no citizenship for purposes of determining whether diversity exists.  
13 There is complete diversity of citizenship between all parties appearing in this matter,  
14 and the amount in controversy exceeds \$75,000.  
15

16           19.     This action is removable pursuant to 28 U.S.C. § 1441 because it  
17 originally could have been brought in this Court.

18           20.     Pursuant to 28 U.S.C. § 1446(d), written notice of the filing of this Notice  
19 of Removal has been given to all adverse parties and a copy of the Notice has been filed  
20 with the clerk of the Superior Court of the County of San Francisco, California.  
21

22           21.     Defendant Union Pacific has consented to removal.

23           22.     Pursuant to 28 U.S.C. § 1446(a), a true copy of all process, pleadings, and  
24 orders served on "CNA Insurance Company" are attached to the Notice of Removal as  
25 Exhibit \_\_, including all documents that have been filed with the Superior Court, County  
26 of Sonoma, California, in this action.  
27

28           23.     Continental states that on December 27, 2004, Plaintiff mailed the

1 Summons and Unverified Complaint to Stephen Lilienthal, the CEO of CNA Financial  
2 Corporation, at his offices in Chicago, pursuant to Section 416.10 of the California Code  
3 of Civil Procedure. Binion Decl. Ex. A (a copy of the envelope enclosing Summons).  
4 Despite the fact that service of process was ineffective under Rule 12(b)(4) and (5), this  
5 Notice of Removal is timely pursuant to 28 U.S.C. § 1446(b) because it is made within  
6 30 days of the mailing of the Summons and Unverified Complaint.

7  
8 24. Copies of this Notice of Removal are simultaneously being served upon  
9 counsel for all parties of record and the Superior Court, County of San Francisco,  
10 California, the court from which this action was removed.

11 WHEREFORE, Continental respectfully requests that this cause proceed in  
12 this Court as an action properly removed thereto.

13  
14 Dated: January 26, 2005

15 CARROLL, BURDICK & McDONOUGH  
16 LLP

17 By 

18 G. David Godwin  
19 Robert Binion

20 MCNABOE COLLIAU & ELENIOUS  
21 Mark Gamboa

22 Attorneys for Defendant  
23 Continental Casualty Company, erroneously  
24 sued herein as "CNA Insurance Company"  
25  
26  
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